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Supreme Court, U.S.
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OCTOBER TERM, 1971

No. 70-49

STATE OF HAWAII, *Petitioner*,

vs.

STANDARD OIL COMPANY OF CALIFORNIA, UNION OIL COMPANY OF CALIFORNIA, SHELL OIL COMPANY and CHEVRON ASPHALT COMPANY, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

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STATE OF HAWAII,
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PRELIMINARY STATEMENT

Respondents present four basic arguments challenging petitioner's standing herein. They contend: (1) that Congress, in enacting Section 4, did not intend to authorize suits by a State as *parens patriae;* (2) that *parens patriae* suits would permit double recovery against antitrust

violators; (3) that the injury to petitioner, its consumer-citizens and its economy is indirect and incapable of calculation; and (4) that the individual consumers injured by antitrust violations have an effective alternative remedy.

As will be demonstrated below, none of these contentions can withstand close analysis or scrutiny.

ARGUMENT

I. CONGRESSIONAL INTENT—AS CONSTRUED IN GEORGIA v. PENNSYLVANIA R. CO., 324 U.S. 439 (1945)—AND THE NATIONAL COMMITMENT TO THE VIGILANT AND EFFECTIVE ENFORCEMENT OF THE FEDERAL ANTITRUST LAWS SUPPORT PETITIONER'S STANDING AS PARENS PATRIAE HEREIN.

This Court has recently stated: "The existence of a statutory right implies the existence of all necessary and appropriate remedies." *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969). See also: *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964) and *Bivens v. Six Unknown Named Agents*, ____ U.S. ____, 91 S.Ct. 1999 (1971). In the cited cases, this Court permitted the recovery of money damages arising out of violations of federal statutes and constitutional provisions even though Congress had not specifically authorized the remedy of damages. The Court correctly reasoned that the damage remedy was necessary to effectuate the national policies embodied in the federal statutes and constitutional clauses involved. These same considerations are relevant here.

In our present case, taking the allegations of the complaint to be true, respondents have violated the federal

antitrust statutes through an extensive program of price-fixing. By its very nature, the illegality was spread among millions of consumers of refined petroleum products in the State of Hawaii. The respondents—recognizing that no possible private remedy for full recovery of antitrust damages exists under the circumstances—now urge this Court to interdict the only meaningful and effective remedy available. In other contexts, such arguments have been categorically rejected. *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 494 (1968).

This Court ruled in *Georgia v. Pennsylvania R. Co.*, *supra*, that when Congress fashioned the civil antitrust remedies, it did not intend to exclude *parens patriae* suits from the purview of the antitrust acts. 342 U.S. at p. 447.

In response to this, respondents contend that *parens patriae* actions are limited to those seeking equitable relief. In so arguing respondents fail to recognize and appreciate the dual policies which warrant *parens patriae* actions:

(1) That certain wrongs are so widespread and so injuriously affect the population, prosperity and well-being of the State as to constitute an independent wrong against the State; and

(2) That some wrongs adversely affect such a large portion of the State's citizenry as to justify a *parens patriae* action by the State as trustee and guardian of its citizens who are otherwise without an effective remedy.

Both of these policy considerations are relevant in this case; hence, petitioner's standing as *parens patriae* is justified on both grounds.

Moreover, in view of these policies, it makes no sense to limit the State to equitable remedies. The State must be able to utilize all of the appropriate remedies to vindicate the federal rights which respondents have infringed. To reiterate: the evidence of a statutory right [under the federal antitrust laws] implies the existence of *all* necessary and appropriate remedies. In the present case, confining petitioner to its equitable remedies would be grossly inadequate in redressing the wrongs which respondents have perpetrated. Only money damages can compensate the State and its citizen-consumers for the revenues which respondents, by their illegal price-fixing scheme, have extracted. And money damages, which remove some of the profit incentive from price-fixing, constitute the most effective deterrent against such violations.

Respondents' attempt (brief, pp. 25-26) to distinguish antitrust standing requirements for injunctive relief (Section 16) and damages (Section 4) is without merit. Respondents can cite no authority for this distinction except the erroneous ruling of the Court below. On the other hand, as was established in petitioner's opening brief (pp. 37-40) filed herein, the identity of purpose which underlies both Sections 4 and 16 makes it clear that these two different remedies are but alternative (and, more often, cumulative) means of protecting the same interests and promoting the same national policies: the vigilant and effective enforcement of federal antitrust laws. See *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-133 (1969). In considering antitrust standing and enforcement, logic would prohibit granting petitioner standing for equitable relief while denying it standing to seek compensatory damages.

This Court, therefore, must recognize the propriety of the money damages remedy which, under the circumstances of this case, is necessary to effectuate the policies underpinning the substantive provisions of the federal statutes which defendants have violated. *Bivens v. Six Unknown Named Agents, supra; J. I. Case Co. v. Borak, supra.*

II. RECOGNITION OF PETITIONER'S STANDING, AS PARENS PATRIAE, TO RECOVER DAMAGES WOULD NOT SUBJECT RESPONDENTS TO THE THREAT OF DUPLICATIVE RECOVERY.

In their brief (at p. 11) respondents raise arguments which manifest their failure to comprehend the nature of *parens patriae* suits under the antitrust laws. Respondents discuss the "possibility" of being sued by consumers as well as the State and ask whether the State has "expropriated" the claims of its citizens. The irrelevance of respondents' contentions is easily demonstrated by reference, once again, to the two alternative theories which support petitioner's prayer for damages herein.

First. Georgia v. Pennsylvania R. Co., supra, establishes that a discriminatory price-fixing conspiracy in one of the major industries within a state (as is alleged in our case) constitutes an independent injury to the State which may be redressed through a suit *parens patriae.* In their brief (pp. 19, 20), respondents clearly concede petitioner's independent interest by quoting from *Georgia v. Tennessee Copper Co.,* 206 U.S. 230, 237 (1907): ". . . In that capacity the State has an interest independent of and behind the titles of its citizens. . . ."

On this basis, the right of the State of Hawaii to seek damages in its *parens patriae* capacity for injury to its economy is one which exists independently of the rights of its citizens. As demonstrated in petitioner's opening brief, *Georgia v. Pennsylvania R. Co. supra,* would have allowed recovery of damages on this basis but for the conflicting Interstate Commerce Act policy which would have characterized any such recovery by the State as a discriminatory and prohibited rebate. Thus, the injury was one to an interest of the petitioner's which is legally protected under the antitrust laws—hence "property" within the meaning of Section 4 of the Clayton Act. *Walden v. British Petroleum Co.,* 231 F.Supp. 72 (S.D. N.Y. 1964).

Second. Under the alternative theory of *parens patriae* recovery, the State of Hawaii may collect damages as trustee, guardian and protector of its injured consumer—citizens who are otherwise without an effective remedy. In this context, the State would be obtaining compensation in its citizens' behalf. There is no possibility of duplicative recovery against respondents in that the money collected by the State as trustee satisfies the claims of the citizen-consumers who are in fact the beneficiaries of that trust.

Respondents' statement concerning the State's "expropriation" of the private claims is wholly without merit and irrelevant to this case. There is no "expropriation" because the State will hold and utilize any recovery for the benefit of the citizens involved. Respondents, in their citation of and quotation from *Louisiana v. Texas,* 176 U.S. 1 (1900) (brief, p. 19) seem to concede the "trus-

tee'' standing of the State as *parens patriae*. Any differences which may arise in the administration of the trust fund are between the State and its citizens and have no bearing on the present lawsuit. For example, the State may permit any citizen to file his specific claim for private losses incurred and be paid out of the fund, the unclaimed portion then escheating to the State. Or, the funds could be used by the State to minimize health hazards generated by air pollution which has resulted from the use of respondents' products. In any event, these are matters to be resolved in the future by the State of Hawaii and its citizens; the questions are not appropriately raised in the present proceeding.

Finally, the question of duplicative recovery by citizens and the State is completely moot here because the statute of limitations has expired as to the relevant damage period (1962-1966) and no consumer antitrust actions have been filed against respondents. Thus, the only possible remedy which now exists for redressing the injuries wrought by respondents' flagrant price-fixing scheme is that sought in our present case. If petitioner's standing to seek damages is not recognized, respondents will be allowed to retain the illicit profits of their antitrust violation.

Thus, the arguments of the respondents, raising the spectre of an impossible duplicative recovery—or recovery as a ''fine'' or ''punishment'' (brief, pp. 11, 12)—must be seen for what they are: smokescreens intended to distract the Court. Petitioner does not here seek a ruling which would permit ''double recovery,'' or recovery of a ''fine,'' but rather a ruling which would prohibit anti-

trust violators from retaining their illegal profits and avoiding any payment of damages whatsover.

III. THE INJURY TO PETITIONER, IN ITS PARENS PATRIAE CAPACITY, IS NOT INDIRECT OR REMOTE; NOR IS THE INJURY INCAPABLE OF MEASUREMENT IN DAMAGES.

A. The Direct Impact Of The Respondents' Antitrust Violation Upon Petitioner.

Respondents correctly state that the Ninth Circuit has led the way toward the more enlightened view of antitrust standing. This has been achieved by that Court's recognition that any antitrust plaintiff whose injury was a *foreseeable* result of the defendants' wrongdoing has standing to redress his injury under Section 4 of the Clayton Act.[1] The respondents fail to recognize, however, that the decision of the Ninth Circuit Court below in our present case represents an unexplained departure from the otherwise enlightened approach of that Circuit on the question of the standing of antitrust plaintiffs.

Under either theory of *parens patriae* recovery here alleged, the injury to petitioner was clearly a foreseeable result of respondents' conduct. First, respondents must have known that a price-fixing scheme which resulted in the artificial inflation of prices in a major industry (petroleum) would cause a misallocation of economic

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[1] At pages 36-37 of their brief, respondents cite numerous antitrust standing ("target area") cases and state, incredibly: "There is no confusion or inconsistency on the question of standing as applied by the Court below." But compare: *Mulvey v. Samuel Goldwyn Productions*, 433 F.2d 1073 (9th Cir. 1970) and *Fields Productions, Inc. v. United Artists Corp.*, 432 F.2d 1010 (2nd Cir. 1970).

resources injurious to the economy and prosperity of the State. Indeed, the economy of the State of Hawaii was not only the "target area" of respondents' violation, but, moreover, its precise battleground.

Second, the losses of revenue suffered by the citizen-consumers of Hawaii who were required to pay the illegally inflated prices were likewise the foreseeable and, indeed, intended results of respondents' illegality.

Thus, under either theory of recovery, petitioner has standing to maintain this action for damages as *parens patriae*. The losses suffered are of the type which the antitrust laws seek to prevent.

B. The Injury To Petitioner As Parens Patriae May Be Calculated In Damages.

Respondents (brief, p. 29) make much of the fact that in *Georgia v. Pennsylvania R. Co., supra,* the State sought "token damages" (in the amount of five million dollars). This fact is used as the cornerstone of respondents' most desperate argument: even if they violated the law and illicitly extracted millions of dollars from the economy and citizen-consumers of the State of Hawaii, this money cannot be recovered because the precise amount of the damages cannot be ascertained in dollars and cents.

This and similar arguments have been totally emasculated by such decisions of this Court as *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946), which respondents fail to discuss (or even cite) in their brief.

Again, the respondents' position crumbles when viewed against the two alternate theories of recovery in this case.

Petitioner, suing as trustee of its citizen-consumers, is entitled to recover the full amount of the overcharge to them which occurred as a result of respondents' price-fixing conspiracy. Assuming that respondents comply with the duties and responsibilities imposed upon them by the pre-trial discovery requirements of the Federal Rules of Civil Procedure, proving the amount of the losses suffered by the citizen-consumers would present none of the difficulties raised in respondents' brief.

Under the theory of recovery upheld in the District Court—relief for independent injury to the economy—*Bigelow* commands that flexibility in the admission of evidence be allowed. There are now available computerized and other scientific means for calculation of such damages. In this respect, the amount of the overcharge is the evidentiary starting point for computing the injury to the economy. As demonstrated in petitioner's opening brief (pp. 49-56), the State, through the use of expert testimony and other evidence, will be able, within the standards articulated by this Court, to establish its injury in dollars and cents. Respondents' factual arguments (brief, pp. 27-28) concerning Hawaii's present economic development must be addressed to the jury rather than this Court. The jury, after weighing the relevant economic data, must be permitted to determine the issue of damages.

Respondents' contention (brief, p. 27) that no jury could comprehend this type of damage computation is easily rebutted:

> "Juries, being gifted with the power to put a dollar value on a person's reputation, or his eyesight, or

his wife's affections, or even his life itself, should have little trouble with so relatively simple a proposition as measuring in dollars the amount of injury a monopolist . . . or a conspirator has inflicted upon his victim's business or property." Rowley, *Proof of Damages in Antitrust Cases*, 32 A.B.A. Antitrust L.J. 75 (1966).

IV. THIS ACTION BY PETITIONER AS PARENS PATRIAE IS THE ONLY EFFECTIVE MEANS FOR REMEDYING THE INJURIES AND ECONOMIC LOSSES CAUSED BY RESPONDENTS' ILLEGAL PRICE-FIXING CONSPIRACY.

Respondents' argument that *parens patriae* be rejected as a means of recovering antitrust damages in favor of a remedy which is more effective requires no extensive reply. Surely, antitrust defendants advance such an argument tongue-in-cheek.

The antitrust violation alleged here is a consumer-oriented price-fixing conspiracy. By its very nature, such a scheme victimizes a wide number of private citizens who are purchasers of mass distributed products (here, motor gasoline and other refined petroleum goods).

Few consumers are injured in a sufficient amount as to justify major and costly antitrust litigation. And, as respondents concede in their brief (p. 48), the District Court below ruled that a class action involving all consumers would be judicially unmanageable.

These considerations are magnified by the additional fact that the statute of limitations has now elapsed, barring any private consumer antitrust actions against respondents arising out of the alleged conspiracy herein. The present action constitutes the *only judicially manage-*

able remedy for fully redressing respondents' alleged price-fixing violation during the relevant time period stated in the complaint. If petitioner's standing is not recognized, respondents will be aided in retaining the fruit of their illicit conspiracy.[2]

CONCLUSION

For the reasons stated above, as more fully set forth in petitioner's opening brief, the judgment below of the United States Court of Appeals for the Ninth Circuit must be reversed.

Dated, San Francisco, California,
October 1, 1971.

Respectfully submitted,

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[2]Respondents improperly raise the factual argument of the existence of their alleged price-fixing conspiracy (brief, pp. 49-50). Respondents are well aware that such is not an issue before this Court and that for purposes of the present proceeding, the allegations of the complaint including the existence of a price-fixing conspiracy must be accepted as true.

Accordingly, petitioner does not accept respondents' implied invitation to burden this Court with a synopsis of the extensive evidence supporting the allegation of respondents' price-fixing scheme.

HAWAII v. STANDARD OIL CO. OF CALIFORNIA ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 70–49. Argued October 21, 1971—Decided March 1, 1972

Section 4 of the Clayton Act does not authorize a State to sue for damages for an injury to its general economy allegedly attributable to a violation of the antitrust laws. Pp. 257–266.

431 F. 2d 1282, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, and BLACKMUN, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post*, p. 266. BRENNAN, J., filed a dissenting opinion, in which DOUGLAS, J., joined *post*, p. 270. POWELL and REHNQUIST, JJ., took no part in the consideration or decision of the case.

Maxwell M. Blecher argued the cause for petitioner. With him on the briefs were *Bertram Kanbara*, Attorney General of Hawaii, *Hiromu Suzawa*, Acting Attorney General, *George Pai*, Deputy Attorney General, *Joseph L. Alioto*, and *Peter J. Donnici*.

Francis R. Kirkham argued the cause for respondents. With him on the brief were *Richard J. MacLaury*, *Moses Lasky*, *Malcolm T. Dungan*, and *William Simon*.

Briefs of *amici curiae* urging reversal were filed by *Evelle J. Younger*, Attorney General of California, and *Anthony C. Joseph*, *Robert Murphy*, *Herbert Davis*, *Michael I. Spiegel*, and *Carole A. Kornblum*, Deputy Attorneys General, for the State of California, and by the Attorneys General and other officials for their respective States and jurisdictions as follows: *William T. Baxley*, Attorney General of Alabama, *Gary K. Nelson*, Attorney General of Arizona, *Ray Thornton*, Attorney General of Arkansas, *Duke W. Dunbar*, Attorney General of Colorado, *Robert K. Killian*, Attorney General of Connecticut, *W. Laird Stabler, Jr.*, Attorney General

of Delaware, *Robert L. Shevin*, Attorney General of Florida, *W. Anthony Park*, Attorney General of Idaho, *William J. Scott*, Attorney General of Illinois, *Richard C. Turner*, Attorney General of Iowa, *Vern Miller*, Attorney General of Kansas, *John B. Breckinridge*, Attorney General of Kentucky, *Jack P. F. Gremillion*, Attorney General of Louisiana, *James S. Erwin*, Attorney General of Maine, *Robert H. Quinn*, Attorney General of Massachusetts, *Frank J. Kelley*, Attorney General of Michigan, *Warren Spannaus*, Attorney General of Minnesota, *John C. Danforth*, Attorney General of Missouri, *Robert L. Woodahl*, Attorney General of Montana, *Robert List*, Attorney General of Nevada, *Warren B. Rudman*, Attorney General of New Hampshire, *George F. Kugler, Jr.*, Attorney General of New Jersey, *David L. Norvell*, Attorney General of New Mexico, *Louis J. Lefkowitz*, Attorney General of New York, *Helgi Johanneson*, Attorney General of North Dakota, *William J. Brown*, Attorney General of Ohio, *Larry Derryberry*, Attorney General of Oklahoma, *Richard J. Israel*, Attorney General of Rhode Island, *Gordon Mydland*, Attorney General of South Dakota, *David M. Pack*, Attorney General of Tennessee, *Crawford C. Martin*, Attorney General of Texas, *Vernon B. Romney*, Attorney General of Utah, *James M. Jeffords*, Attorney General of Vermont, *Andrew P. Miller*, Attorney General of Virginia, *Slade Gorton*, Attorney General of Washington, *Chauncey H. Browning, Jr.*, Attorney General of West Virginia, *Robert W. Warren*, Attorney General, and *George F. Sieker*, Assistant Attorney General, of Wisconsin, and *J. Lee Rankin* of the City of New York.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

The issue presented by this case is whether § 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 15, authorizes a

State to sue for damages for an injury to its economy allegedly attributable to a violation of the antitrust laws of the United States. We hold that it does not.

I. Procedural History

Hawaii filed its initial complaint on April 1, 1968, against three of the four respondents.[1] On May 24, 1968, and again on August 19, 1968, Hawaii filed amended complaints. The third amended complaint, filed on September 6, 1968, raised for the first time the issue presented herein. That complaint named all four respondents as defendants and charged them with violating the Sherman Act, 26 Stat. 209, 15 U. S. C. § 1, in the following ways: by entering into unlawful contracts; by conspiring and combining to restrain trade and commerce in the sale, marketing, and distribution of refined petroleum products; and by attempting to monopolize and actually monopolizing said trade and commerce.[2] The State sought to recover damages in three distinct capacities: in its proprietary capacity for overcharges for petroleum products sold to the State itself (first count); as *parens patriae* for similar overcharges paid by the citizens of the State (second count); and as the representative of the class of all purchasers in Hawaii for identical overcharges (third count).

The second count read, in relevant part:

"18. The above-named plaintiff [Hawaii], [acts] in its capacity as *parens patriae*, and/or as trustee

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[1] Chevron Asphalt Co. was not named as a defendant in the initial complaint. As pointed out in the text, *infra*, the company was named as a defendant in the third and fourth amended complaints which raise the question presented to the Court.

[2] In the third amended complaint, the State abandoned a claim made in the initial complaint that the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. § 13 (a), had been violated. This claim has not been resurrected in any of the later stages of the proceedings.

for the use of its citizens who purchased refined petroleum products, from any defendant or co-conspirator herein . . . .

"19. The unlawful contracts, combination, conspiracy in restraint of trade, unlawful combination and conspiracy to monopolize, and monopolization have resulted in the plaintiff, . . . and in its citizens, paying more for refined petroleum products than would have been paid in a freely operating competitive market. Plaintiff has not yet ascertained the precise extent of said damage to itself and its citizens, however, when said amount has been ascertained, plaintiff will ask leave of Court to insert said sum herein."

Very similar language appeared in the class-action count. In all three counts, the State sought both injunctive and monetary relief.

After each of the respondents moved to dismiss the second and third counts of the complaint, the District Court held a hearing to determine the propriety of the State's suing on behalf of its citizens. With respect to count two, the court held that Hawaii "has not even alleged an interest in its citizens' claims, much less interest of its own aside from the State's proprietary rights," and granted the motions to dismiss.[3] Viewing the class action as being "overlapping, parallel and/or alternative to" the *parens patriae* claim, the court dismissed the third count as well.[4]

Hawaii filed its fourth amended complaint on February 27, 1969. This is the complaint with which we are concerned. Count one contains a reiteration of Hawaii's claim that in its proprietary capacity the State paid an

[3] The opinion of the court is unreported, but is contained in App. 51–58.

[4] *Id.*, at 58.

excessive price for the petroleum products that it purchased from respondents. Count two states a new *parens patriae* claim, and count three is drawn as a class action.

The *parens patriae* claim is stated in the following manner:

"19. The State of Hawaii, acting through its Attorney General, brings this action by virtue of its duty to protect the general welfare of the State and its citizens, acting herein as *parens patriae*, trustee, guardian and representative of its citizens, to recover damages for, and secure injunctive relief against, the violations of the antitrust laws hereinbefore alleged.

"20. The unlawful contracts, combination and conspiracy in restraint of trade, unlawful combination and conspiracy to monopolize and monopolization, hereinbefore alleged, have injured and adversely affected the economy and prosperity of the State of Hawaii in, among others, the following ways:

"(a) revenues of its citizens have been wrongfully extracted from the State of Hawaii;

"(b) taxes affecting the citizens and commercial entities have been increased to affect such losses of revenues and income;

"(c) opportunity in manufacturing, shipping and commerce have [*sic*] been restricted and curtailed;

"(d) the full and complete utilization of the natural wealth of the State has been prevented;

"(e) the high cost of manufacture in Hawaii has precluded goods made there from equal competitive access with those of other States to the national market;

"(f) measures taken by the State to promote the general progress and welfare of its people have been frustrated;